87-472

Supreme Court, U.S.
FILED
AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,

Petitioners,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, and The Fidelity Standard Life Insurance Company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether an order of a state court, in a construction defects action, enjoining a party, just before trial, from presenting its expert evidence to the jury, as a discovery sanction, is tantamount to dismissal and violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection, in the absence of an evidentiary hearing by the trial court and any findings of wilful disobedience, gross indifference, or intended negligence, when such evidence thus precluded had been conceded by all parties as necessary to establish the claims of the Petitioners below, where the trial court considered no less drastic evidentiary sanctions?

2. Whether an order of a state court, requiring a party, just before trial, to post three-quarters-of-a-million-dollars as security for trial by jury is tantamount to dismissal and violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection, in the absence of an evidentiary hearing by the trial court and any findings of probable cause or likely outcome, under threat of punishment for contempt?

3. Whether a trial judge's refusal to disqualify himself from presiding at a state trial in which he will be required to sit as a trier of fact, following his having already rendered substantive decisions in the case on those identical facts against a party, violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection, denying to them an unbiased trier of fact without the type of pre-judgment which would permit the challenging of a juror for cause?

4. Whether a state appellate court's refusal, on an appeal as a matter of right, to consider Petitioners' claim that the preclusion of their experts violated state and federal law, is tantamount to no appeal at all and violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection in the state appellate process?

5. Whether a state appellate court's refusal, on an appeal as a matter of right, to consider Petitioner's claim that a three-quarters-of-a-million-dollars security order violated state and federal law, is tantamount to no appeal at all and violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection in the state appellate process?

6. Whether a state appellate court's refusal, on an appeal as a matter of right, to consider Petitioners' claim that the trial judge was disqualified from proceeding as a trier of fact as a matter of state and federal law, is tantamount to no appeal at all and violates Petitioners' constitutional rights under the

Fourteenth Amendment to Due Process and Equal Protection in the state appellate process?

7. Whether a state appellate court's refusal, on an appeal as a matter of right, to consider Petitioners' constitutional claims in these circumstances, on the grounds that they did not proceed to trial without their evidence, unable to post the three-quarters-of-a-million-dollars security, and before a trier of fact with a bent of mind, is tantamount to punishment for Petitioners' refusal to accept such a denial of their constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection, and thus violates such constitutional guarantees?

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JURISDICTIONAL GROUNDS

The Judgment of the Intermediate Court of Appeals of the State of Hawaii which Petitioners seek to review in this Court is dated May 19, 1987; Judgment was also entered on that date.

The Opinion of the Intermediate Court of Appeals below was rendered on April 3, 1987, and was amended, upon timely motion for reconsideraton, by Order Amending Opinion of Court, dated April 22, 1987.

Petitioners sought review in the Hawaii Supreme Court, pursuant to local rules, which Writ Application, duly filed, was denied, on May 8, 1987.

Respondents Willis Sinsabaugh and Waterfront Properties, Inc., also sought reconsideration of the denial of their costs in the Hawaii Intermediate Court of Appeals, which motion for reconsideration was denied on May 5, 1987; these Respondents, however, did not apply for review by the Hawaii Supreme Court, the time for which expired on May 18, 1987.

Thus, on May 19, 1987, the Judgment of the Intermediate Court of Appeals was entered on the rehearing.

Jurisdiction of this Court is based upon the provisions of Section 2101(c), allowing ninety days *after the entry of judgment* within which to make application.

GOVERNING CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the United States Constitution (1868):

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*[1]

[1]Emphasis supplied.

STATEMENT OF THE CASE

The Richardson Petitioners are residents of Hong Kong who were kidnap victims of Central American terrorists in 1981; once freed from his underground dungeon, after 100 days, Mr. Richardson joined his wife in Hawaii where, on the advice of their physician, they purchased a home in which to recuperate from their ordeal. Later the property was transferred to their family corporation, Petitioner Copthorne, N.V.

Petitioners paid $500,000 down for their waterfront residence and continued to make payments to the seller, Mr. Lane, until winter rains brought extensive flooding and subsequent investigation revealed that the house construction was defective and hidden defects had been concealed from them, with full knowledge, by Mr. Lane and his brokers, Waterfront Properties and Mr. Sinsabaugh.

On March 29, 1982, suit was brought in state court in Hawaii for rescission, for fraud, and for damages; later The Fidelity Standard Life Insurance Company intervened in the action, holding the underlying mortgage from Mr. Lane on the property. On July 23, 1982, Mr. Lane filed for Chapter 11 protection in federal court in Hawaii, and the state suit was stayed until permitted to proceed by the bankruptcy court on September 30, 1982.

The action below was extensively litigated in state court for three years. Over 700 documents were filed in state court; more than 50 oral depositions were taken, some lasting four days, in Hawaii, Hong Kong, Texas, and California; 45 pretrial motions were argued by the parties; more than one-half million dollars was spent by the parties for attorneys' fees and costs, and Petitioners alone spent more than $100,000 for experts in preparation for trial.

Hawaii has given its Chief Justice extensive management responsibilities, including reassigning judges at different court levels; three court days before the trial date assigned for this action below, the trial was assigned to a state district court judge, temporarily appointed to the circuit court from his traffic court duties and related exclusively nonjury work.

On less than 24-hours notice, the trial attorneys for Mr. Lane moved the temporary trial judge, newly appointed and obviously unfamiliar with the complexities of the case, just two court days before trial, for dismissal based on alleged failure to provide sufficient time for them to have deposed Petitioners' experts, and for an order requiring Petitioners to post what was owed on the sale before trial began.

Even Mr. Lane's attorneys, in brief oral argument, acknowledged that the expert testimony involved was "the guts of this case" and asked the trial court only to "put the trial off for a specific amount of time, a week, and let us finish these oral depositions".[2]

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[2]Appendix L, line 4, page 15, lines 22–24, page 14.

In truth, Petitioners had permitted weeks of depositions of their experts during the months before trial and had only objected to more such discovery the week before trial; as a matter of law, the court rules did not even permit any discovery within 30 days of trial anyway.

The temporary trial judge, however, at that time completely unfamiliar with the case and without an evidentiary hearing stunned everyone in the courtroom by ordering that Petitioners could not use their major experts and evidence at trial. He then ordered that Petitioners must deposit with the court $743,750 as security for trial over-the-weekend. The entire record of these bizarre rulings is contained within the official transcripts of both hearings set forth in Appendix L to this Petition. Prior thereto the state court had imposed *no* discovery sanctions of any kind upon Petitioners. Upon being informed by Petitioners' attorneys that Petitioners would be unable to go to trial that following week without their experts and could not post such "security" for trial over-the-weekend, the temporary trial judge informed Petitioners' attorney that that was their problem.

Petitioners made vigorous attempts to seek reconsideration or an interlocutory appeal, but all such efforts were rebuked, and even sought immediate review in the Hawaii Supreme Court by emergency writ, which effort was denied on the grounds that there would be an adequate remedy by way of appeal, in *Richardson v. Sasaki*, Hawaii, No. 10414, January 28, 1985.

On the next court day, immediately prior to the start of trial, Petitioners then moved to disqualify the temporary trial judge assigned, not on the basis that they did not like his rulings, but on the basis that he had decided, without an evidentiary

hearing, issues based upon facts which he would be called upon again at trial to decide based upon the evidence at trial, since the case was a mixed judge/jury action, and that Petitioners had a constitutional right to a trial by a trier of fact without a bent of mind whose knowledge was restricted to the evidence to be presented at trial; Judge Sasaki refused even to consider disqualification.[3]

Prior to the start of trial, on January 21, 1985, Petitioners informed the court that they would be unable to go to trial as they could not prove their case without their expert evidence, that they were unable to post $743,750 as security for trial, and that they would not accept a biased trial judge as satisfying their constitutional rights to a fair trial.

Petitioners at that time were entering their seventies; Mrs. Richardson was so ill that only at the last minute did her Hong Kong physician permit her to leave for the trial; Mr. Richardson had a serious heart condition. Neither they nor their counsel perceived the wisdom or necessity of going through a "fire drill" conducting a trial without their evidence; as a result, the Petitioners returned to Hong Kong obviously disillusioned with American justice, to seek their appellate remedies.

The trial court then immediately granted default judgments on the counterclaim for cancellation of the sale, and dismissed Petitioners' complaint, granting to Mr. Lane and Mr. Sinsabaugh and Waterfront Properties extensive fee and cost awards, without even adherence to state procedural rules, some of which orders were reversed on appeal.

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[3]Appendix M.

In further support of Petitioners' claim of bias, it was subsequently learned that the temporary trial judge had met secretly with those victorious Respondents in his chambers to draw up the judgments, without notice to Petitioners, in violation of universally accepted judicial ethical rules.

And, the only damages awarded against Petitioners, notwithstanding the prior order to post $743,750 as security for trial, even upon an "uncontested" default hearing, was only $1.00 each.[4]

Petitioners appealed as of right pursuant to Section 641-1 of the Hawaii Revised Statutes. Their first appeal was refused by the Intermediate Court of Appeals, to which under state law the appeal was assigned by the Hawaii Supreme Court, because the temporary trial judge had forgotten to dismiss the cross-claims among Respondents below in his written judgments.

Petitioners appealed again, anew, and that appeal was also heard by the Intermediate Court of Appeals, by assignment. In its opinion[5] the Intermediate Court again refused to consider the merits of Petitioners' constitutional arguments and held that since Petitioners did not proceed to trial on January 21, 1985, notwithstanding their reasons, the state appellate court would not consider the events that occurred before then—which of course was "the guts" of Petitioners' appellate case.

Upon a motion for reconsideration, the Intermediate Court did correct part of the trial judgments pertaining to obvious

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[4]Appendix I, paragraph 4.
[5]Appendix

excessive cost awards, but continued to refuse to provide a review on the merits of Petitioners' grounds for appeal, except for minor procedural matters. Review was then denied by the Hawaii Supreme Court, without opinion or consideration of the merits of the appeal, upon which Petitioners now appeal to this Court for justice and for a vindication of their federal constitutional rights.

TREATMENT OF FEDERAL QUESTIONS BELOW

The federal questions sought to be reviewed were raised by Petitioners at *every* level within the state court system.

The original motions of Respondents seeking discovery sanctions and security for trial were presented to the temporary trial judge on less than 24-hours notice, and no opportunity was provided at that time to file written objections.

At the January 17, 1985, hearing, the court had given no prior warning that it would preclude witnesses, and permitted no further argument.

At the January 18, 1985, hearing on security, Petitioners' attorney protested on federal constitutional grounds:[6]

> This is an order to provide security and both state law and federal law of a constitutional foundation decided by the United States Supreme Court in the last decade require findings of fact; . . . My understanding of federal constitutional law is that a state attachment process can not issue unless there is a finding of fact concerning the likelihood of success, and no such findings of fact has been made.

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[6]Transcript of Proceedings, January 18, 1985, page 38, lines 15–18, 5–8.

When the order below requiring a security deposit was presented to the Petitioners' counsel below for signature as to form, he refused and inscribed:[7]

> Decline to sign as the substance and form of this Order are unconstitutional.

On January 21, 1985, Petitioners' counsel below filed written objections to both the preclusion and security rulings, citing their unconstitutional character.[8]

On January 21, 1985, just prior to the start of trial, Petitioners' counsel continued to protest that they were not being provided a fair trial:[9]

> Your Honor, my clients will not waive their trial by jury but have instructed me not to participate in this proceeding because we believe they're being deprived their constitutional right to trial by jury and to a trial judge who is impartial.

When the trial court then proceeded to hold additional hearings to assess costs and attorney's fees, Petitioners' counsel presented the trial court with written objections to the proceedings, stating with specificity eight grounds for

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[7]Order dated January 27, 1985, signed by Judge Sasaki, page 2.

[8]Record, Volume XIII, 255–264, Volume XIII, 266–272.

[9]Transcript of Proceedings, January 21, 1985, page 16, lines 19–23.

constitutional objections, which included the preclusion and security rulings, in each case stating:[10]

> are unconstitutional and represent a denial of federal due process and equal protection guarantees.

On January 22, 1985, Petitioners filed an application in the Hawaii Supreme Court, Case No. 10414, seeking a Writ of Mandamus, for immediate relief, and argued, on constitutional grounds, that they had been denied a "trial by jury" and a "fair trial" contrary to "federal constitutional law."[11] The application was denied on the basis that Petitioners would have a remedy by way of appeal.

Subsequent to the decisions below, Petitioners filed two separate appeals, assigned to and heard by the Intermediate Court of Appeals; two opening briefs were filed and two sets of reply briefs, by these Petitioners; in every brief filed Petitioners recited their contention that the actions complained of "denied to Plaintiffs fundamental Hawaii and United States Constitutional guarantees to trial by jury, due process of law, and equal protection of the law". This argument was presented throughout the appellate record below, in argument after argument, citing most of the cases referred to in this Petition, and the same reasoning on constitutional grounds now presented here.

Petitioners in their motion for reconsideration recently before the Intermediate Court, and their attempt thereafter

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[10]Statement of Objection On Jurisdictional and Constitutional Grounds, etc., filed February 19, 1985; Record, Volume XVI 1–10, at 2, 3, 4, 6, 7, 8, and 9.

[11]Petition, page 4.

to secure review in the Hawaii Supreme Court, continued to make their federal constitutional arguments known to these state appellate courts; for instance, their application for a writ of certiorari presented to the Hawaii Supreme Court on May 4, 1987, specified three grounds for review, which are briefly summarized below as follows:

1. that the preclusion and the security rulings of the trial court violated "the due process and jury trial guarantees of the Hawaii and United States Constitutions"
2. that the various procedural errors and ethical violations by the trial judge violated "the due process and jury trial guarantees of the Hawaii and United States Constitutions"
3. that the failure of the Intermediate Court of Appeals to grant an appeal on the merits by considering Petitioners' claims is "contrary to the due process and equal protection guarantees of the Hawaii and United States Constitutions"

Neither the trial court, the Intermediate Court of Appeals, or the Hawaii Supreme Court, in oral argument or in written opinions or orders ever *once* addressed any of those federal constitutional issues which were presented below, nor did they ever *once* even address their significance as a matter of Hawaii law. Neither the merits of the case *or* of the constitutional questions were ever examined. Their rejection, on the other hand, is implicit within all of the state court decisions rendered against these Petitioners, notwithstanding their federal constitutional objections.

LEGAL ARGUMENT

Petitioners request that a Writ of Certiorari be granted to review the decision of the Hawaii Intermediate Court of Appeals for the following reasons:

POINT I

Certiorari should be granted because the state appellate court has decided federal questions in a manner which directly conflicts with the applicable decisions of this Court.

This Court has consistently held that the Fourteenth Amendment prohibits state courts from punishing litigants by imposing discovery sanctions which impair their ability to prove their case in court unless there has been a long history of such pretrial abuses documented in a particular case, an evidentiary hearing has been held, and a prior opportunity given for compliance beforehand. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1908). This requirement of due process of law is firmly embedded within this Court's constitutional doctrine, both with respect to state courts and the federal judicial system. See *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958); *Hovey v. Elliott*, 167 U.S. 409 (1897).

Similarly, *every* federal Court of Appeals which has considered such issues has ruled consistently with this Court's constitutional mandate that all litigants be permitted to have their day in court without unnecessary pretrial contempt citations. *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir. 1984); *Potlach Corp. v. U.S.*, 679 F.2d 153 (9th Cir. 1982); *Marshall v. Segona*, 621 F.2d 763 (5th Cir. 1980); *Wilson v. Volkswagen of America*, 561 F.2d 494 (4th Cir. 1977); *Flaks v. Koegel*, 504 F.2d 702 (2d Cir. 1974); *Richmond v. General Motors*, 437 F.2d 196 (1st Cir. 1971); and the state decisions are also in accord, see *Kemp v. Qualls*, 473 A.2d 1369 (Pa. 1984); *Grimes v. Haslett*, 641 P.2d 813 (Alaska 1982); *Gerhart v. Honeoye Storage Corp., 88 A.D.2d 757 (4th Dept. N.Y. 1982); Fox v. How*, 309 N.W.2d 520 (Iowa 1981); *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980).

Indeed, such preclusion amounts to a *dismissal* by the trial court:[12]

> [J]ust as establishment of dispositive facts has the same effect as judgment by default or dismissal, when the effect of a preclusion order is to prevent introduction of evidence necessary to establish the claim of the delinquent party, so does the sanction under Rule 37(b)(2)(B).
>
> Accordingly, it has been held that before a preclusion order will be made relating to a necessary element of the case, there must be some showing of wilful disobedience or gross indifference to the rights of the adverse party, deliberate callousness or intended negligence.

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[12]Moore's *Federal Practice*, Rule 37, Vol. 4A, pp. 37–70 and 37–71.

Identically, the lower court's $743,750 security order on the eve of trial is equally offensive to due process holdings of this Court, rendered without an evidentiary hearing, without findings of fact, and without provision for prejudgment procedures of any sort. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); see *Randone v. Superior Court, 5 Cal.3d 536 (1971); Brunswick Corp. v. Galaxy Cocktail Lounge*, 54 Haw. 656 (1973).

This Court, in *Fuentes*, identified the common evil in both such security and preclusion orders, that procedural due process demands a fair opportunity to be heard before such drastic measures may be taken and findings of fact that will support such rulings.

The issue of disqualification of a biased trial judge is similarly determined by due process considerations, as this Court has recently held. *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580 (1986); such bias need not be extraneous to the action itself, for, if "before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him", *Whitaker v. McLean*, 118 F.2d 596 (D.C. 1941).

The fundamental right to be tried by an impartial judge is at the bedrock of due process of law, yet Petitioners' challenge to their temporary trial judge was completely ignored; see *Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir. 1974) for the thoughtful analysis of Circuit Judge MacKinnon in dissent. The issues of bias raised here present matters of great importance that should be settled by this Court.

The state appellate court confronted all three of these constitutionally sensitive problems in its opinion below[13] with the vigilance of ostriches.

First, the Hawaii Intermediate Court refused to consider the issues of preclusion, security, and disqualification at all, stating that it would not review events prior to the lower court's dismissal on January 21, 1985, which occurred because the trial court's rulings made it impossible for Petitioners to proceed with trial. Such reasoning only argues in a circle, for the actual questions on appeal pertain to the effect of such prior matters on Petitioners' constitutional rights.

For example, as Petitioners' claim, the *actual* dismissal occurred on January 17th and 18th when the trial court took a hatchet to Petitioners' case, the judicial equivalent to cutting out someone's tongue and then criticizing them for not being further able to speak.

Second, the Hawaii Intermediate Court totally ignored the record below. What makes this case a perfect one for review is that the trial court made *no record* to support its actions below. The temporary trial judge had had the file for only one day and had had no prior experience with the action, making it impossible to conclude that he was experienced with any long-standing discovery abuse. The voluminous record in the action contains *not one* prior discovery sanction imposed, despite numerous self-serving pretrial motions in the case. There was *not even a single minute of evidentiary hearings allowed.* And *no findings of fact* were even attempted with

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[13]Appendix A.

respect to the preclusion injunction, the security injunction, or the disqualification rejection. Although Respondents would like to supplement the record with adversarial contentions, the plain fact is that everything that was done to these Petitioners below resembled the fact gathering of the Star Chamber.

Had the Intermediate Court looked at what was in the record, it would have witnessed an overwhelming amount of contrary evidence. The claim of Mr. Lane that he had not been allowed to take the oral depositions of Petitioners' experts could have been *compared to* the nearly one-foot-high stack of deposition transcripts taken of Petitioners' experts only weeks before the trial date. Mr. Lane's attorney's claim that he needed more time with expert Lipman could have been *compared to* his recorded statement at the end of Mr. Lipman's last deposition: "I have no further questions".[14]

There is a greater vice in the Intermediate Court's opinion than mere oversight. Petitioners were entitled to an appeal as a matter of right. Having had no consideration of their appeal on the merits in the state appellate process, Petitioners have thus also been denied equal protection of the law as well as due process guarantees, as a meaningful opportunity to be heard was not even accorded here, although provided to others in the state in the appellate process. See *Pennzoil Co. v. Texaco*, 107 S. Ct. 1519 (1987) (concurring opinion of Justice Brennan).

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[14]By Attorney Gibson, found in Transcript of Lipman, December 19 and 20, 1984, p. 167, in record below.

POINT II

Certiorari should be granted because the state appellate court has interpreted and adopted federal precedents in a manner which erroneously violates federal constitutional guarantees to due process of law.

The Hawaii Intermediate Court justified its refusal to inquire into the merits of Petitioners' appeal by "adopting" what it considered to be the reasoning of a Third Circuit Court of Appeals' decision in 1974, *Marshall v. Sielaff*, 492 F.2d 917. In that case the District Court dismissed plaintiff inmate's civil rights suit after he refused to proceed with his case when his request for writs of habeas corpus ad testificandum for three of his fellow prisoners was denied.

Whatever the constitutional validity of the *Marshall* holding might be, that decision is *wholly inapplicable* to our facts, and to apply it as precedent in Petitioners' case is offensive to the Fourteenth Amendment for a variety of *distinguishing* reasons.

First, in *Marshall* that court had no jurisdiction over the witnesses demanded; here, the experts wanted to testify.

Second, in *Marshall* that court found no clear need for the witnesses' testimony; in our case it was conceded that our experts were "the guts" of Petitioners' case, to cite again the colorful language of Mr. Lane's counsel.

Third, in *Marshall* that court anticipated a short trial, whereas in our suit a trial lasting four to six weeks had been planned for by all sides.

Fourth, in *Marshall* that court announced its findings and conclusions for its preclusion order; here, no such findings and conclusions are presented in the order.[15]

Fifth, in *Marshall* the reviewing court carefully considered what had occurred at the preclusion hearing in deciding the appeal, whereas the Intermediate Court here refused to examine any of the surrounding circumstances.

Sixth, in *Marshall* the trial court had no other choice, no lesser sanctions, as it believed it had no jurisdiction to secure the requested witnesses; in our case the court had many lesser sanctions such as delaying the trial for three days to allow more expert depositions, or requiring that they be held over the weekend before trial, but did not even consider lesser sanctions.

Marshall, in short, was not a preclusion case at all; no discovery sanction punishing the plaintiff was there imposed; the trial court merely made a jurisdictional ruling that could not be appealed until the action was concluded; and that is the key distinction that escaped the Hawaii Intermediate Court, for although embracing *Marshall* in result, what apparently really motivated the Hawaii appellate court was a fear of "piece-meal" appeals—a consideration which hardly outweighs the preservation of constitutional rights to a fair and impartial trial.

Petitioners' situation would be no more of a piece-meal appeal than would result with the entry of any dismissal or summary judgment, where such decision was subsequently reversed—thus resulting in a trial and a later appeal once

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[15]Appendix F.

again. If indeed the effect of the preclusion order constitutionally was a dismissal, as the Petitioners' contend, like any dismissal it would be appealable as a matter of right; the policy against piece-meal appeals has nothing to do with the merits of Petitioners' appeal. If Petitioners' view of the Fourteenth Amendment is correct, it was a dismissal; if not, Petitioners have had no other choice than to accept the result for without their expert evidence their construction defects case was lost anyway. How many civil actions, one might ask, could be deprived of "the guts" of the case and prevail at trial?

Moreover, logic suggests that there should also be a policy against piece-meal trials, if the underlying reasoning is to conserve litigant and court time; piece-meal trials would consume even more system resources, after all. What the Petitioners did was in the interest of saving time; to proceed to a hopeless trial without supporting evidence would serve no purpose, when the issue that would ultimately have to be decided was the constitutional validity of the discovery sanction that crippled the case. If Petitioners lose in this Court, a needless trial was avoided; if Petitioners win their appeal, a needless trial was also avoided. To conclude that Petitioners' failure to proceed to trial is contrary to any policy against piece-meal appeals is to argue against both logic and policy.

The doctrine against piece-meal appeals has itself lost favor, not surprisingly, with American courts, which have repeatedly refused to follow its blind lead when questions of fairness must be weighed in the balance.

Thus, as early as 1848 this Court in *Forgay v. Conrad*, 6 How. 201, permitted "piece-meal" appeals in situations to avoid

irreparable injury. More recently, the Court of Appeals for the Ninth Circuit, in *Anderson v. Allstate Insurance Co.*, 630 F.2d 677 (1980), found the piece-meal appeal argument unpersuasive, in granting appellate review in other situations:[16]

> Mindful of the Supreme Court's command that practical, not technical, considerations are to govern the application of principles of finality, *Gillespie v. United States Steel Corp., 379 U.S. 148. . .(1964); Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541. . .(1949), we decline appellee's invitation to exalt form over substance by dismissing this appeal.

Virtually every other federal Court of Appeals quickly adopted the *Anderson* view; e.g., *Sandidge v. Salem Offshore Drilling Co.*, 764 F.2d 252 (5th Cir. 1985); *Gillis v. U.S. Department Of Health And Human Services*, 759 F.2d 565 (6th Cir. 1985); *Martin v. Campbell*, 692 F.2d 112 (11th Cir. 1982).

It is not surprising therefore that the 1974 *Marshall* decision, which the Hawaii Intermediate Court "adopted" as dispositive of our case, has been abandoned even in its own jurisdiction, see *Reif v. A. H. Robbins*, 90 F.R.D. 526 (E.D. Pa. 1981), and is now cited *only* in *support* of the stated judicial policy against dismissal:[17]

> The Court of Appeals for the Third Circuit has made it clear that dismissal for failure to prosecute is a "harsh remedy and should be

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[16]Quotation from *Jetco Electronic Industries v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir. 1973), cited approvingly in *Anderson*.

[17]*Reif*, supra.

> resorted to only in extreme cases," because the law favors disposition of cases on their merits. *Marshall v. Sielaff*, 492 F.2d 917, 918 (3d Cir. 1974).

The opinion of the Hawaii Intermediate Court of Appeals below would seem to be an anomaly even in Hawaii, for the Hawaii Supreme Court as early as 1978, in *Bagalay v. Lahaina Restoration Foundation*, 60 Haw. 125, held that the dismissal sanction for failure to prosecute should be restricted to "extreme circumstances" where there is a "clear record of delay or contumacious conduct" and where "lesser sanctions would not serve the interest of justice", and that policy was affirmed recently in *Lim v. Harvis Construction*, 65 Haw. 71, 73 (1982).

None of those conditions are present here. No such findings of fact were even attempted by the trial court below. *None.*

POINT III

Certiorari should be granted because our civil justice system is urgently in need of the constitutional guidance of this Court in the management of the growing tensions between court administration and the needs of substantive justice.

For decades this Court under the able leadership of its past Chief Justice has sponsored a long overdue series of impressive court reforms, nationwide, which have speeded up case flow and materially reduced undesirable court congestion.

Regrettably, no revolution can avoid excesses. What happened below may ultimately be but one important manifestation of a growing and general problem. We have been unintentionally transforming our court system into an administrative agency with a mind set that gives priority to administrative convenience even over constitutional concerns.

The temporary inferior court judge who axed Petitioners' case below himself was a product of our new free assignment system, under the total management discretion in Hawaii of one appointed Chief Justice; he certainly understood the new philosophy to speed up cases and reduce backlog, for he would not even delay the trial for a few more days but, with all the self-righteousness of one responsible for establishing train schedules, saw nothing wrong in simply telling Petitioners not to bring their evidence to trial.

Is this the new type of judicial temperament to be permitted under the banner of court reform? This is a federal question that must ultimately be settled by this Court, and this case should be a new starting point.

Were this a criminal case, there could be no doubt that this Court in these circumstances would grant review and reverse. See *Rock v. Arkansas*, No. 86-130, Slip Opinion, June 22, 1987, recently decided by this Court, striking down evidentiary rules that are arbitrary and disproportionate to the purposes they are designed to serve.

Our *civil* justice system is in serious need of similar attention, for often the results in civil cases are equally or even more onerous and depriving.

Petitioners below had paid to Mr. Lane over $600,000 toward the purchase price, and had paid amounts in excess of that for court costs, attorneys' fees, expert expenses, and their own personal litigation costs—all of which was in effect confiscated by the single abrupt decision of one temporary judge, deciding without even an evidentiary hearing and without even having attempted to construct a supporting record with customary findings of fact and conclusions of law.

There are many in our society who might rather spend a few days in jail, or perhaps more, rather than lose over one million dollars in that manner. Neither this Court nor the Fourteenth Amendment should be so blind as to fashion constitutional doctrine based upon unrealistic distinctions plucked from the heaven of legal concepts that insult human experience.

CONCLUSION

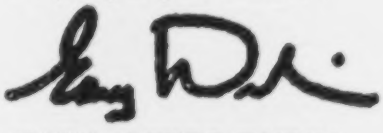
Petitioners have had neither a trial on the merits *nor* an appeal on the merits below, an impressive victory thus far for the sporting theory of justice. This is Petitioners' last chance to secure Justice in their case.

Beyond whatever momentary pomp and circumstance may accompany our celebration of the 200th anniversary of our Constitution, history will surely judge the quality of American Justice, not by the number of drummers in our parades, but by the ultimate treatment of individual cases such as this, where the injustice presented goes back well before 1787, to the historic meadows at Runnymede.

For the reasons given in this Petition, Petitioners pray that the Writ be granted and that the erroneous decision of the Intermediate Court of Appeals of the State of Hawaii affirming the trial court below be summarily reversed *or* that Petitioners be heard on the merits of the case.

Honolulu, Hawaii
August 17, 1987

Respectfully submitted,



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